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No. 94-983

In The

Supreme Court of the United States

October Term, 1994

JOHN L. HOLAHAN, JR., in his capacity as Chair of the Minnesota Ethical Practices Board; HUBERT HUMPHREY III, in his official capacity as Attorney General of the State of Minnesota,

Petitioners,

v.

SCOTT DAY, Treasurer of IMPACE-MEA; *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS MITCHELL HOYT UNRUH AND LORI ERICKSON

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QUESTION PRESENTED FOR REVIEW

1. Does a state campaign financing statute which both suppresses the independent expenditure levels of certain candidates and denies them public subsidies, while it increases the independent expenditure levels of their political opponents and provides their opponents with public subsidies, violate the First and Fourteenth Amendments to the United States Constitution?

LIST OF PARTIES

Respondents Mitchell Hoyt Unruh and Lori Erickson agree with Petitioners Holahan and Humphrey's (hereafter "the State") "List Of Parties" set forth in their petition for *writ of certiorari,* except, however, that these Respondents believe that Respondent Minnesota Citizens Concerned for Life (MCCL), a non-profit corporation organized under Minnesota law and an appellant in Case Number 94-2388, does not have an interest in this petition because the statutes in question affect its political action committee, Minnesota Citizens Concerned for Life for State Pro-Life Candidates (MCCLCSPC) (represented by separate counsel for purposes of this petition), rather than itself.

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BRIEF IN OPPOSITION FOR RESPONDENTS MITCHELL HOYT UNRUH AND LORI ERICKSON

The Respondents respectfully request that this Court deny a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this action on September 1, 1994.

STATEMENT OF THE CASE

This case concerns First and Fourteenth Amendment challenges to a Minnesota campaign finance statute which restricts independent expenditures (as well as a

companion statute which concerns the reporting requirements for independent expenditures). As will be discussed, when independent expenditures are made, this statute penalizes persons, political action committees (PAC's) and certain candidates by restricting these candidates' expenditure limits and by denying them public subsidies, while it increases the expenditure limits of their opponents and provides their opponents with public subsidies.

I. BACKGROUND OF THE CASE

On May 15, 1993, the Minnesota Legislature amended the Ethics and Campaign Acts with Laws 1993, Chapter 318. These amendments regulate campaigns for statewide and legislative office and, *inter alia*, regulate expenditures by individuals, corporations, and political committees in connection with such elections. The amendments became effective May 21, 1993.

On December 20, 1993, this action was commenced by MCCL, Eileen Angell – a member of MCCL and a contributor to its political action committee – and MCCLCSPC. On December 30, 1993, the complaint was amended by adding Respondents Unruh and Erickson, both of whom are candidates for the state legislature.

Lori Erickson is a resident of Minnesota. She ran for election to the Minnesota State Senate in 1990 and in 1992. She intends to run for election to the state senate in 1996.

Mitchell Hoyt Unruh is a resident of the State of Minnesota. At the time of this complaint, Mr. Unruh intended to run for election to the Minnesota House of Representatives in 1994. In his 1994 campaign, he

intended to be bound by the expenditure limits imposed by the state's public financing scheme.

II. THE OPERATION OF THE STATUTES AT ISSUE.

The Ethics Act, as amended, provides that the expenditure limits of a candidate against whom an independent expenditure is made "are increased by the sum of independent expenditures made in opposition to [such] a candidate plus independent expenditures made on behalf of the candidate's major political party opponents. . . . " Minn. Stat. § 10A.25, subd. 13(a).[1] It also provides that "within three days after providing [the] notice [required by Minn. Stat. § 10A.25, subd. 13(b)], the board shall pay each candidate against whom the independent expenditures have been made . . . an additional public subsidy equal to one-half the independent expenditures." Minn. Stat. § 10A.25, subd. 13(c).

Thus, under Minn. Stat. § 10A.25, subd. 13(a), when someone makes, or becomes obligated to make, an independent expenditure in support of a candidate, the state increases the expenditure limit of the candidate's political opponent while restricting the candidate's expenditure limit. Moreover, under Minn. Stat. § 10A.25, subds. 13(a) and (c), when someone makes, or becomes obligated to make, an independent expenditure in opposition to the candidate's political opponent, the state increases the

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[1] Similarly, the Ethics Act, as amended, provides that a candidate's expenditure limits "are increased by the sum of independent expenditures made in opposition to [such] a candidate plus independent expenditures made on behalf of the candidate's major political party opponents . . . " if its opponent has an independent expenditure made on its behalf. Minn. Stat. § 10A.25 subd. 13(a).

expenditure limit of the candidate's political opponent (*see* Minn. Stat. § 10A.25, subd. 13(a)) *and* gives the opponent an out right monetary subsidy (*see* Minn. Stat. § 10A.25, subd. 13(c)) while restricting the candidate's expenditure limit and denying the candidate a public subsidy.

The effect of Minn. Stat. § 10A.25, subd. 13, is to penalize the free speech rights of persons, not-for-profit corporations, and PAC's that make independent expenditures by providing benefits to the candidates they oppose as a direct result of their political activities. Furthermore, the effect of the statute is to penalize the free speech and equal protection rights of candidates who are having independent expenditures made in their favor by suppressing their expenditure limits relative to those of their opponents and to penalize the free speech and equal protection rights of candidates whose opponents are having independent expenditures made against them by suppressing their expenditure limits relative to those of their opponents and by denying these candidates public subsidies.

Respondents Unruh and Erickson brought suit against the Ethics Act as amended, Minn. Stat. § 10A.25, subd. 13, on the ground that by suppressing their expenditure limits relative to that of their political opponents, and by providing their opponents with public subsidies while denying such subsidies to them, the statute infringed upon their First Amendment rights. They also challenged this provision on the ground that by treating them differently than their political opponents in this

manner, the statute violated their rights to the equal protection of the laws.[2]

III. THE DECISIONS OF THE LOWER COURTS

After the district court denied the Respondents' motion to preliminarily enjoin Minn. Stat. § 10A.25, subd. 13, they moved for summary judgment regarding, *inter alia*, the constitutionality of this provision. For the reasons set forth in the State's petition (*see* Petition at 14-15), the district court denied that part of the Respondents' motion concerning Minn. Stat. § 10A.25, subd. 13. The Respondents subsequently appealed this decision.

The United States Court of Appeals for the Eighth Circuit reversed the ruling of the district court pertaining to Minn. Stat. § 10A.25, subd. 13. The court reiterated the pronouncements of this Court that independent expenditures, as a form of political speech, are entitled to "the broadest protection." App. at A9. Yet the operation of Minn. Stat. § 10A.25, subd. 13 infringes upon this form of protected speech by chilling the willingness of persons to make independent expenditures. *Id.* The court thus implicitly found that the statute penalizes the exercise of political speech.

The court's finding was based upon the fact that under the statute, a person, such as Ms. Schweitz, intending to make an independent expenditure to *defeat* a candidate will, instead, "becom[e] directly responsible for

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[2] Respondent Schweitz, represented by separate counsel for purposes of this petition, brought suit against Minn. Stat. § 10A.25, subd. 13 on the ground that it infringed upon her First Amendment rights by penalizing her making of independent expenditures.

adding to her campaign coffers." *Id.* at A8. Thus, "[t]o the extent that [the] candidate's campaign is enhanced by the operation of the statute, the political speech of the individual . . . who made the independent expenditure against the candidate" is impaired. *Id.* The court noted that "[t]he knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy . . . as a direct result of that independent expenditure, chills the free exercise of that protected speech," and amounts to "self-censorship." *Id.* at A9.

The Eighth Circuit stated that the district court took too narrow of a view of whether the statute was content-based. *Id.* at A7. It observed that because the statute only singles out a particular type of speech – "that which advocates the election or defeat of a candidate and/or supports the election of her opponent" – this infringement is content-based. *Id.* at A10.

Next, the court found that because participation in the financing scheme – the purported governmental interest behind the statute – was almost "100% *before* enactment of [§] 10A.25, subd. 13," the asserted interest was not even legitimate, let alone compelling. *Id.* at A11 (emphasis in original). In fact, the court intimated that this alleged interest was probably "contrived for purposes of this litigation." *Id.* at A12.

Finally, given the extremely high participation rate of candidates in the public financing scheme before the enactment of § 10A.25, subd. 13, the court stated that this infringement on First Amendment rights could hardly be viewed as "narrowly tailored." *Id.* The court noted that, for example, only three percent of all candidates declined

to participate in the public financing scheme in the year previous to the statute's passage. "[S]urely," the court reasoned, "the three percent of non-participants could be brought [into the scheme] by means less burdensome to constitutional rights – assuming that group can be brought in at all." *Id.* Accordingly, the court held the statute unconstitutional.[3]

Next, the Court of Appeals invalidated Minn. Stat. § 10A.20, subd. 6b. It noted that this section "is directed exclusively to independent expenditures, clearly for the purpose of implementing subdivision 13 of section 10A.25." *Id.* at A15. "With section 10A.25 subd. 13 declared unconstitutional," the court declared that "the state cannot convincingly show a substantial relation between the information sought [by the reporting requirements of Minn. Stat. § 10A.20, subd. 6b] and a subject of overriding and compelling state interest." *Id.* It thus held that § 10A.20, subd. 6b is not severable from

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[3] The court observed that even if the statute were viewed as being content-neutral, it would not pass constitutional muster. Specifically, it stated that regardless of whether the purported interest was "substantial, [§] 10A.25, subd. 13 cannot logically be characterized as 'essential' to furthering [this alleged] interest." *Id.* at A13. Given that "no more than an additional three percent of all candidates could be brought into the public campaign financing scheme," the court noted that "the statute's negative impact on political speech must be in violation of the First Amendment rights of those who wish to make the independent expenditures at issue." *Id.* at A13-A14. In short, the court stated that "[t]he statute's burden on First Amendment rights does not satisfy strict, intermediate, or even the most cursory scrutiny." *Id.* at A14.

§ 10A.25 subd. 13 and struck down this provision as well.[4] *Id.*

REASONS WHY THE PETITION SHOULD BE DENIED

This case does not simply involve the State choosing to provide benefits to certain candidates, as the Petitioners allege. Rather, it concerns the State penalizing persons who engage in protected political speech, thereby infringing upon their First Amendment rights. In this regard, the decision of the Court of Appeals is in harmony with similar decisions by her sister circuits and is mandated by the precedents of this Court.

Furthermore, even if the analysis employed by the Eighth Circuit is incorrect, there are alternate grounds for invalidating Minn. Stat. § 10A.25 subd. 13 as violating the First and Fourteenth Amendment rights of candidates. These alternate grounds demonstrate that the Court of Appeals correctly struck down this provision. Given this correct result, this Court should not hear this case simply to render what in effect would amount to an advisory opinion on election law.

Finally, this case involves the straightforward application of basic principles of constitutional law. Because there is no conflict with either this Court or with other

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[4] The Eighth Circuit also noted that "[t]he Minnesota campaign ethics law provides detailed requirements for the reporting of campaign expenditures, including independent expenditures apart from those found in section 10A.20 subd. 6b." *Id.* at A14. "Therefore," the court observed, "even if section 10A.25 subd. 13 were constitutionally sound," "the requirements of section 10A.20 subd. 6b may be redundant in serving any legitimate purpose and thus constitutionally burdensome." *Id.*

circuits on these principles, this Court should devote its valuable resources to cases of greater import to the nation and deny the petition.

I. THE DECISION OF THE COURT OF APPEALS ON THE RESPONDENT SCHWEITZ'S FIRST AMENDMENT CLAIMS IS IN HARMONY WITH PRIOR DECISIONS OF THIS COURT AND WITH SIMILAR DECISIONS OF HER SISTER CIRCUITS.

In its petition, the State portrays this case as a situation where the government is merely providing candidates with a benefit – something, it argues, it is clearly allowed to do. [Petition at 17]. However, as discussed *supra*, and as the Court of Appeals perceptively observed, this case really involves the government *penalizing* the exercise of protected political speech by providing benefits to only certain classes of candidates and only in direct response to certain protected political activities. This penalty infringes upon core First Amendment values, and because it is content-based, necessitates applying the most exacting scrutiny – scrutiny which it does not pass.

The State relies upon the opinion of the district court for the proposition that § 10A.25 subd. 13 does not impose a penalty upon anyone. *Id.* It notes the court stated that the statute does not (formally) "restrict anyone from making independent expenditures"; it does not (formally) "dictate the content of the messages communicated by those making such expenditures"; and it does not (formally) "force individuals or associations to fund the expression of viewpoints they oppose." *Id.* This simplistic analysis by the State is an example of form over substance.

The flaw in the State's argument is apparent by examining its intent in enacting this provision, as well as the statute's effect upon the making of independent expenditures. If one makes the most cursory examination of the statute's operation and looks beyond the thinly shrouded veil of apparent "neutrality," it is evident that § 10A.25 subd. 13 was intentionally enacted to penalize the exercise of only certain types of political speech and unfortunately has had precisely that effect. In this fashion, the State is attempting to do indirectly what it clearly is prohibited from doing directly: penalizing the making of independent expenditures.

In *Buckley v. Valeo,* this Court noted that limitations on independent expenditures "operate in an area of the most fundamental First Amendment activities." 424 U.S. 1, 14 (1976). It observed that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of [our] system of government," and therefore, "[t]he First Amendment affords the broadest protection to such political expression . . . " *Id.* It thus concluded that expenditure limitations "impose direct and substantial restraints on the quantity of political speech." *Id.* at 39.

This Court rejected the governmental interests that were advanced in support of these limitations: 1) maximizing the effectiveness of other statutory provisions; *Id.* at 44[5] 2) preventing corruption and the appearance of corruption; *Id.* at 45, and 3) equalizing the relative ability

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[5] This Court stated that "[t]he markedly greater burden on basic freedoms caused by [the statute] . . . cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations." *Id.*

of individuals and groups to influence the outcome of elections. *Id.* at 48.[6] Accordingly, this Court announced that "[w]hile the independent expenditure ceiling fails to serve any substantial governmental interest . . . it heavily burdens core First Amendment expression." *Id.* at 47-48. It then proclaimed that restrictions on independent expenditures were unconstitutional under the First Amendment. *Id.* at 51.

Under *Buckley* then, it is clear the government cannot constitutionally limit the making of independent expenditures for any of the aforementioned reasons. Yet this is precisely what the State in this case has surreptitiously attempted to do. Specifically, the State knew it could not directly prohibit the making of independent expenditures in order to advance the above-stated interests. Therefore, it enacted § 10A.25 subd. 13 to *indirectly* prohibit (or at least effectively prevent) their making in order to further these interests. The Court of Appeals expressly recognized this illicit motive in its opinion. It noted that an important "sponsor of the legislation *intended*" to limit the making of independent expenditures. App. at A9.[7]

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[6] This Court stated that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.*

[7] The Eighth Circuit observed that "senator John Marty, then chairman of the Senate Ethics and Campaign Reform Committee and chief author of the senate bill, explained to the Senate Committee on Finance how the legislation would prevent or dramatically limit independent expenditures, a goal that he recognized could not be accomplished directly because it would violate the First Amendment." *Id.* at n.4.

This was done, presumably, to advance its three interests behind the statute: 1) to increase the effectiveness of the statutory scheme; (Petition at 14: "to preserve the viability of the voluntary spending limit program,"); 2) "to limit the potential for corruption or the appearance of corruption;" *Id.* at 6, and; 3) to equalize the ability of persons and groups to influence the political process, i.e., to equalize speech. (*Id.* at 5: "[t]hey also hoped to decrease the influence of money.") Under *Buckley*, these interests are constitutionally insufficient to justify the limitations on the making of independent expenditures that § 10A.25 subd. 13 has effectively imposed.

By examining the particular context or scenario in which the statute will operate, it is apparent that the statute has had the effect of penalizing, and thereby limiting, the making of independent expenditures. The statute does not operate in a vacuum. It does not simply provide benefits to only certain candidates based upon legitimate criteria with no repercussions to persons besides the candidates themselves.

Rather, the State, through Minn. Stat. § 10A.25 subd. 13, will only confer benefits to particular candidates if its citizens engage in a certain type of political speech. The crux of the matter is that the benefit the State will provide is the exact opposite result of what the "expenders" desire in terms of their purpose in exercising their First Amendment rights.

The statute will come into play only if the person makes an independent expenditure in favor of a candidate who that person supports or if he or she makes an expenditure against a candidate who that person opposes. Thus, if a person supports candidate A and opposes candidate B, and the person exercises its right to

free speech by making an independent expenditure *in support* of **candidate A**, § 10A.25 subd. 13 will, as a direct result of this expenditure, increase only the expenditure limits of candidate B – the candidate who the person opposes – while suppressing the expenditure limits of candidate A – the candidate who the person supports.

Moreover, if the person exercises their right to free speech by making an independent expenditure *against* **candidate B** – the candidate who it opposes – § 10A.25 subd. 13 will, as a direct result of this expenditure, increase only the expenditure limits of candidate B, while it suppresses the expenditure limits of candidate A – the candidate who it supports; **and** it will, as a direct result of this expenditure, provide only candidate B with a public subsidy, while it denies candidate A such a subsidy.

In other words, the statute will, as a **direct result** of a person exercising their right to engage in protected political speech, provide benefits to the candidate, *and only to the candidate,* who the person opposes. In this way, the State is sending an unmistakable message to its citizens: if you exercise your right to engage in protected political speech by opposing (or supporting) particular candidates, we will **penalize** you by instead providing subsidies only to those candidates who you oppose, **and** we will suppress the expenditure limits (relative to those of their opponents) of only those candidates who you support.

Because persons naturally do not want to harm those candidates who they support, or aid those candidates who they oppose – and § 10A.25 subd. 13 penalizes them for making independent expenditures in precisely this fashion – they will refrain from speaking at all. The statute is thereby chilling their willingness to speak on

matters of public concern.[8] Such a result is squarely at odds with the purpose of the First Amendment.

The purpose of the First Amendment is to further our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), and thereby "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484 (1957). Yet for the aforementioned reasons, § 10A.25 subd. 13 perverts this important purpose by penalizing, and consequently deterring or "chilling," the exercise of protected political speech. In this fashion, it is infringing upon First Amendment rights.

In sum, the Eighth Circuit correctly found that the statute **penalizes,** and thereby infringes upon, First Amendment rights. Thus, *as a group*, the "benefit" cases the Petitioners rely upon to demonstrate an alleged conflict between the Eighth Circuit and her sister circuits, and between the Eighth Circuit and this Court, are unpersuasive. In some, each of these cases is factually distinguishable from the instant case.

Initially, the Petitioners assert that the findings of the Eighth Circuit are at odds with the pronouncements of this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976). Specifically, they note that in *Buckley*, this Court "upheld a

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[8] As the Court of Appeals has observed, this chilling effect on First Amendment rights is, unfortunately, already occurring. *See* App. at A9: "the mere enactment of section 10A.25 subd. 13 already has prevented many if not most potential independent expenditures from ever being made."

statute which provided federal funds for presidential candidates who entered primary campaigns, but did not provide funds for candidates who did not run in party primaries." [Petition at 18]. Therefore, the Petitioners imply, because this Court in *Buckley* upheld the ability of Congress to provide funds to only certain candidates, the Eighth Circuit erred in finding that the State of Minnesota could not do likewise in this case.

The problem with this analysis is that in *Buckley*, Congress *was* simply providing benefits to candidates. It was not seeking to utilize these benefits to *penalize* persons for exercising their First Amendment rights. In other words, unlike the instant case, Congress did not provide federal funds to only certain candidates and only in direct response to another person (or PAC) exercising their right to engage in protected political speech; further, it did not provide funds only to those candidates who the persons engaging in protected political speech opposed. In other words, Congress did not provide funds to candidates with the intent and effect of penalizing, and thereby chilling, free speech.

In short, *Buckley* involved the provision of benefits, not the imposition of penalties. It is thus easily distinguishable from the instant case. The decision of the Court of Appeals was consistent with the teachings of this Court.

Next, the Petitioners cite *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969), where this Court upheld two aspects of the "fairness doctrine" requiring a broadcaster to provide broadcast time to respond to personal attacks. The petitioners claim that in that case, the Supreme Court approved the provision of benefits "in response to another's exercise of

protected speech." Petition at 19. However, in the case at bar, the State is providing more than simply an "opportunity to respond." Rather, it is penalizing its citizens for engaging in protected political speech. *Red Lion* is thus also factually distinguishable from the case at bar.

The remainder of the cases the Petitioners cite to demonstrate that the decision of the Eighth Circuit conflicts with similar decisions by other circuits and with the decisions of this Court are similarly distinguishable. These cases involve situations where the government is legitimately providing a benefit, as opposed to the situation which exists in the instant case: where the government is providing a benefit as a pretense to penalize, and thereby deter, the exercise of free speech.[9]

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[9] The Petitioners assert that the "fundamental flaw" in the Court of Appeals' decision was "its conclusion that a state cannot confer a benefit on someone in response to another's protected speech," and that "[t]his basic principle is in conflict with decisions of this Court and several circuit courts." *Id.* at 24. This misstates the findings of the Eighth Circuit. In reality, the Court of Appeals correctly concluded that the State cannot penalize persons for exercising their First Amendment rights when the purported governmental interest is not even legitimate, let alone compelling. This principle is most certainly not in conflict with the decisions of this Court or with those of other federal appellate courts.

The Petitioners then state that the "Respondents would like the law to be that if they engage in protected political speech, the government cannot do anything that might help another respond to that speech." *Id.* Again, the Petitioners misstate the case. What the Respondents want is for the State to follow basic First Amendment law which declares that the government cannot intentionally and effectively penalize persons for exercising their First Amendment rights – which is precisely what the State has done in this case.

After correctly finding that § 10A.25 subd. 13 infringes upon the political speech of Ms. Schweitz, the Eighth Circuit examined whether this infringement passes constitutional muster. It correctly concluded that it does not.

As noted, the Eighth Circuit found that because the statute only penalizes a particular type of speech – "that which advocates the election or defeat of a candidate and/or supports the election of her opponent" – this infringement is content-based. App. at A10. The Petitioners contend that this is incorrect. They maintain that under this Court's decision in *Turner Broadcasting System v. FCC*, ___ U.S. ___, 114 S.Ct. 2445 (1994), the penalty imposed by the statute is not content-based because § 10A.25 subd. 13 does not express "any favoritism toward or disagreement with any messages." Petition at 25, n.13. This argument is disingenuous.

By only penalizing the exercise of a particular kind of political expression, the State does express favoritism toward a specific type of speech, i.e., that speech the utterance of which is **not** penalized.[10] Thus, under the State's own rationale, the penalty imposed by § 10A.25 subd. 13 is content-based. Therefore, heightened scrutiny must be applied.

Next, contrary to the Petitioners' assertions, the Eighth Circuit correctly found that the statute is not narrowly tailored to serve a compelling government interest. The Court of Appeals observed that candidate

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[10] As the Court of Appeals noted, "[i]ndependent expenditures of any other nature, supporting the expression of any sentiment other than advocating the defeat of one candidate or the election of another, do not trigger the statute's limit-increases and money-shifting provisions." App. at A10.

participation in the public financing scheme – the purported interest behind the statute – was almost "100% *before* enactment of [§] 10A.25, subd. 13." *Id.* at A11 (emphasis in original). Thus, based on the plain facts, this asserted interest was not even legitimate, let alone compelling.

The State contends that its interests in "enhanc[ing] the public's confidence in the political process by encouraging candidates to accept campaign expenditure limitations and by regulating the flow of money directly into campaigns to reduce the influence of wealthy special interest groups," as well as "reduc[ing] the potential for . . . corruption," are sufficiently compelling to justify the statute's infringement on First Amendment rights. Petition at 26. Assuming *arguendo* that the Petitioners are correct,[11] they nevertheless miss the point of the Eighth Circuit's holding.

The Court of Appeals did **not** hold that these purported interests were not sufficiently compelling, but rather that they were not implicated in this case. Specifically, it stated that the State cannot realistically be concerned about a lack of candidate participation in its statutory scheme "but for" § 10A.25, subd. 13, because before this statute even existed, candidate participation was "nearing 100%." *Id.* at A11. Thus, in reality, it "clearly" was unnecessary to enact the statute in order to ensure candidate participation. *Id.*

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[11] However, as the Eighth Circuit observed, "while this may be a noble goal," it is not at all clear that such a purported interest is sufficiently compelling "to justify the burden that the statute imposes upon speech." App. at A11.

In short, given the complete lack of a factual basis for this purported concern, the Eighth Circuit could not help feeling that this alleged interest was probably "contrived for purposes of this litigation." *Id.* at A12. Accordingly, based on the plain facts, it held that the asserted interest was not legitimate.[12]

Finally, the Petitioners do not even attempt to rebut the Eighth Circuit's conclusion that the statute is not "narrowly tailored" to advance the State's purported interest. They merely note that "[b]ecause the maintenance of a high participation scheme is *directly related* to the State's compelling interest in preventing corruption . . . the independent expenditure provisions are constitutional even if they do burden free speech. (emphasis added)" Petition at 27 - 28. Again, the Petitioners miss the point.

The relevant inquiry is not whether the statute is *related* to advancing its purported objectives, but given that it treads so heavily on precious First Amendment

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[12] The State attempts to extricate itself from this factual morass by asserting that "participation rates near 100 percent in the past certainly do not guarantee full participation rates in the future." Petition at 27. It then asserts that the "record in this case shows that, in the past, participation rates have fluctuated." *Id.* There are at least three problems with this contention. One, the State does not cite that portion of the "record" which supposedly supports this factual assertion. Two, as the Court of Appeals noted, what is actually **in** the record, i.e., participation levels "nearing 100%," supports just the opposite inference: because participation rates were steadily rising in the years previous to the statute's enactment (*see* App. at A11 - A12), the statute is **not** needed to ensure participation. Three (relatedly), the notion that participation rates will drop if the statute is invalidated is pure speculation and as shown by the evidence in the record, is simply illogical.

rights, whether it is *narrowly tailored* to do so. As the Eighth Circuit observed, because of the extremely high participation rate of candidates in the public financing scheme before the enactment of § 10A.25 subd. 13, the statute's infringement on First Amendment rights could hardly be viewed as "narrowly tailored." App. at A12.[13] Therefore, the statute fails this prong of a heightened scrutiny analysis as well.

In sum, by penalizing the exercise of protected political speech, the statute infringes upon First Amendment rights. Because the statute only penalizes certain types of political speech, this infringement is content-based. Furthermore, under the plain facts, the asserted interest behind this infringement is not even implicated. Finally, due to the extremely high participation rate in the public financing scheme before the passage of the statute, the provision is not narrowly tailored to advance the State's purported interest. Therefore, the Eighth Circuit correctly held that, consistent with the principles of this Court and with similar decisions of her sister circuits, § 10A.25 subd. 13 is unconstitutional.[14]

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[13] For example, referring to the 97% participation rate before the statute was enacted, the court reasoned that "[s]urely the three percent of non-participants could be brought [into the scheme] by means less burdensome to constitutional rights – assuming that group can be brought in at all." *Id.*

[14] For the reasons set forth in its opinion, the Eighth Circuit also correctly invalidated the companion statute to § 10A.25 subd. 13, to wit, the notice provisions of § 10A.20, subd. 6b.

II. THE STATUTE IN QUESTION IS UNCONSTITUTIONAL UNDER ALTERNATE FIRST AMENDMENT GROUNDS AND UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Section 10A.25, subd. 13 also infringes the First and Fourteenth Amendment rights of Respondents Unruh and Erickson. When someone makes an independent expenditure in support of candidates Unruh and Erickson, the state will increase the expenditure limits of their political opponents while it suppresses their expenditure limits. Moreover, when someone makes an independent expenditure in opposition to their political opponents, the state will increase the expenditure limits of their opponents *and* give them public subsidies, while it suppresses the expenditure limits of candidates Unruh and Erickson and denies them public subsidies.

By suppressing their expenditure limits relative to that of their opponents and by denying them public subsidies, the State is penalizing candidates Unruh and Erickson because some other person – who is completely beyond their control – exercised their right to engage in protected speech. Quite simply, the statute is suppressing their political speech relative to that of their opponents, thereby interfering with their ability to participate in the political process. In this fashion, § 10A.25, subd. 13 infringes upon their free speech and equal protection rights.

The alleged governmental interest supporting this one-sided suppression of expenditure limits and denial of public money is to encourage candidates to opt into the public subsidy/voluntary spending limit statutory scheme (*see* discussion, *supra*). As discussed, this interest

is not even implicated in this case; moreover, assuming *arguendo* that it is implicated, the means employed by the State to advance it are not narrowly tailored. The statute thus violates the First and Fourteenth Amendment rights of candidates Unruh and Erickson.

A. The Statute Violates The First Amendment Rights Of Candidates Unruh And Erickson.

The restraints § 10A.25, subd. 13 impose on the independent expenditure limits of candidates Unruh and Erickson are content-based. As discussed in Part I, these restraints are triggered only when independent expenditures are made either in support of candidates Unruh and Erickson or against their political opponents. In other words, these restraints only come into play when independent expenditures of a particular content occur. In such a case, to pass constitutional muster the statute must be "narrowly drawn to serve a compelling state interest." *Boos v. Barry*, 485 U.S. 312, 321 (1988). The statute fails this test.[15]

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[15] Even if the restraints on the independent expenditure levels of candidates Unruh and Erickson were content-neutral, the statute would not pass constitutional muster. To be upheld in this situation: 1) the limitation must advance an important governmental interest; 2) the interest must be unrelated to the suppression of free expression; and 3) the incidental restriction on First Amendment freedoms must be no greater than is essential to furthering that interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

As the Eighth Circuit observed when similarly applying the content-neutral analysis to the statute's infringement on the First Amendment rights of Ms. Schweitz, regardless of whether the purported interest of encouraging candidates to opt into the statutory scheme was "substantial, [§] 10A.25, subd. 13 cannot

For the same reasons the Court of Appeals concluded that § 10A.25, subd. 13 fails this test when applied to the statute's infringement on the First Amendment rights of Ms. Schweitz, it also fails this test in terms of its infringement on the First Amendment rights of candidates Unruh and Erickson. First, under the plain facts of this case, the interest the statute is supposed to serve is not even implicated. Thus, far from advancing a *compelling* government interest, Minn. Stat. § 10A.25, subd. 13 does not even further a *legitimate* government interest.

As the Court of Appeals observed, participation in the statutory scheme – the purported interest behind the statute – was almost "100 *before* enactment of [§] 10A.25, subd. 13." App. at A11. Thus, based upon the facts, this asserted interest was not implicated. In other words, it was unnecessary to enact the statute to ensure that candidates would opt into the statutory scheme when the overwhelming majority of them were already doing so before the statute even existed. Thus, this alleged interest is not legitimate.

Second, the statute is not narrowly tailored to advance this interest. In other words, it does not utilize

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logically be characterized as 'essential' to furthering [this alleged] interest." App. at A13. Specifically, given that "no more than an additional three percent of all candidates could be brought into the public campaign financing scheme, . . . the statute's negative impact on political speech must be in violation of the First Amendment rights of those who wish to make the independent expenditures at issue." *Id.* at A13-A14. In short, as with its burden on the First Amendment rights of Ms. Schweitz, "[t]he statute's burden on [the] First Amendment rights [of candidates Unruh and Erickson] does not satisfy strict, intermediate, or even the most cursory scrutiny." *Id.* at A14.

means that will advance the interest without unnecessarily infringing on First Amendment rights. Given the extremely high participation rate of candidates in the public financing scheme before the enactment of § 10A.25, subd. 13, the statute's infringement on First Amendment rights is not narrowly tailored. Therefore, it fails this prong of a heightened scrutiny analysis as well.

B. Because The Statute Suppresses The Political Speech Of Respondents Unruh And Erickson While Enhancing The Political Speech Of Their Political Opponents, It Denies Them The Equal Protection Of The Laws.

For purposes of Minn. Stat. § 10A.25, subd. 13, Respondents Unruh and Erickson are similarly situated with their political opponents. These individuals are all candidates; they are all subject to the Ethics Act; and they are all unable to regulate or otherwise control the activities of persons who choose to make independent expenditures in Minnesota State Elections.

Nevertheless, Minn. Stat. § 10A.25, subd. 13 classifies these candidates – Respondents Unruh and Erickson are placed in one class and their political opponents are placed in another – and then treats these classes differently if a person makes an independent expenditure against the political opponents of Respondents Unruh and Erickson. If such an expenditure is made, § 10A.25, subd. 13 will penalize Respondents Unruh and Erickson by restricting their expenditure limits and by denying them public subsidies while it increases the expenditure

limits of their opponents and provides them with public subsidies.[16]

The alleged reason for this discriminatory treatment is that it is necessary for the viability of the statutory scheme. Specifically, the State asserts it must restrict the speech of candidates Unruh and Erickson by suppressing their expenditure limits (relative to those of their opponents) and by denying them public subsidies (while it provides them to their opponents) to induce candidates to opt into the scheme. If this were not done, the State asserts, candidates would not opt into the scheme because they would be unable to respond to independent expenditures.

As shown above, in reality, this concern is simply not valid. Furthermore, the operation of the statute does not even advance its purpose. Therefore, the statute fails both a rational basis and a strict scrutiny analysis.

1. Under A Rational Basis Analysis, The Statute's Disparate Treatment Of Respondents Unruh And Erickson Is Unconstitutional.

Because § 10A.25, subd. 13 affects the exercise of a fundamental right (*see* Part 2, *infra*), the Court should utilize a strict scrutiny analysis when evaluating the disparate treatment the statute affords candidates Unruh and Erickson. Nevertheless, if the Court declined to apply this standard, it would still find the statute unconstitutional because it is not rationally based.

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[16] Similarly, if independent expenditures are made in support of Respondents Unruh and Erickson, their opponents will receive increased expenditure limits, while their expenditure limits are suppressed. Minn. Stat. § 10A.25, subd. 13(a).

The operation of § 10A.25, subd. 13 does not advance its purported rationale for treating candidates differently, to wit, encouraging candidates to opt into the campaign finance scheme by enabling them to adequately address the "problem" of independent expenditures that are made during the campaign. As the State admits, it purposefully excludes from the public subsidy component of the statute any independent expenditures that occur during the primary election. [Petition at 12, n.6: "§ 10A.25, subd. 13(c) (Supp. 1993) has no application to independent expenditures made in connection with a primary election . . . "]

In other words, even though a large portion of independent expenditures – responding to which is the principal aim of the statute – are made during the primary, the State has excluded all such expenditures from the scope of the statute's public subsidy component. In short, it is illogical to completely exclude a large portion of independent expenditures from the scope of this component, when combatting independent expenditures is claimed to be critical to the operation of the statutory scheme, and in fact, is the primary (claimed) purpose of the statute itself.

Thus, because § 10A.25, subd. 13 is not even rationally related to accomplishing its goal of enabling candidates who opt into the statutory scheme to reply to independent expenditures, it fails a rational basis test. Consequently, its disparate treatment of candidates is unconstitutional.

2. Under A Strict Scrutiny Analysis, The Statute's Disparate Treatment Of Respondents Unruh And Erickson Is Unconstitutional.

When a First Amendment right is involved in an equal protection claim, it is necessary to apply strict scrutiny to evaluate the different treatment of the classes involved. *New York Club Association v. City of New York*, 487 U.S. 1, 13-16 (1988). One must examine: 1) the justification for treating the classes differently, i.e., whether the government had a compelling interest to treat the classes differently; 2) whether the statute advances the interest behind treating the classes differently; and 3) whether the statute advances this interest without unduly infringing upon protected freedoms. In this case, under **two** separate frameworks, the different treatment § 10A.25, subd. 13 affords candidates fails all **three** parts of this test.

First, the State asserts it is necessary to suppress the expenditure limits of the Respondents and to deny them public subsidies in order to encourage other candidates to opt into the scheme. Thus, the State believes that because it wants to allegedly "subsidize" certain candidates, it can utilize § 10A.25, subd. 13 to penalize candidates Unruh and Erickson.

Assuming, *arguendo*, that this case merely involves the provision of benefits, it is true that the government does not have the obligation to subsidize all speech equally. *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 546-547 (1983). However, there is no **compelling interest** in penalizing a person by suppressing their speech in order to enhance the speech of another. Yet this is precisely what the State seeks to do.

In sum, simply because the State wants to award the opponents of candidates Unruh and Erickson with public subsidies and higher expenditure limits, it cannot use this desire to suppress the Respondents' speech. Such a purpose is not a compelling interest for restricting their First Amendment rights.

Furthermore, as discussed in part 1, because of the operation of § 10A.25, subd. 13, the interest behind treating the candidates is not even advanced by the statute.

Finally, § 10A.25, subd. 13 does not advance the purported interest in treating the candidates differently in a way that is narrowly tailored to advance that interest. In short, because the statute does not advance the State's interest in inducing candidate participation in the statutory scheme, then, by definition, in treating the Respondents differently than their opponents, it *unduly* infringes upon their First Amendment rights.

Second, as discussed in Part I, under the facts of this case, the State's interest in enacting § 10A.25, subd. 13 is not implicated. Specifically, as noted, *before* the enactment of the statute, candidate participation in the statutory scheme was already very high; in short, then, there was simply no need to pass this statute to induce candidate participation in the scheme. Thus, because this purported interest is not even implicated under the facts, it fails to be legitimate, let alone compelling.

Furthermore, it is highly dubious whether the purported interest behind this differential treatment of candidates is even advanced by the statute. As the Court of Appeals observed, given the 97% level of candidate participation in the statutory scheme before the enactment of § 10A.25, subd. 13, it is questionable whether "that group

[i.e., the remaining three percent] could be brought in at all." App. at A12.

Finally, the statute does not advance the purported interest in treating the candidates differently in a way that is narrowly tailored to advance that interest without unnecessarily infringing on the Respondents' First Amendment rights. As discussed, and as observed by the Court of Appeals, given the high rate of candidate participation before § 10A.25, subd. 13 was enacted, the statute's sweeping infringement on the Respondents' rights to free speech and the equal protection of the laws could hardly be viewed as "narrowly tailored." *Id.*

In sum, under both the aforementioned frameworks, the statute's different treatment of Respondents Unruh and Erickson fails a strict scrutiny analysis and is thus unconstitutional.

III. THIS CASE INVOLVES BASIC AND STRAIGHTFORWARD PRINCIPLES OF CONSTITUTIONAL LAW AND THIS COURT SHOULD DEVOTE ITS RESOURCES TO CASES OF GREATER IMPORT TO THE NATION.

As demonstrated in Parts I and II, *supra*, § 10A.25, subd. 13 is unconstitutional for several reasons under both the First and Fourteenth Amendments. In sum, then, not only was the Court of Appeals correct in invalidating the statute on the grounds that it violates the First Amendment rights of Ms. Schweitz, but it just as easily could have invalidated it on the grounds that it violates the First and Fourteenth Amendment rights of candidates Unruh and Erickson. Therefore, this Court should not grant the petition and thereby utilize its precious resources in hearing this case when the decision of the

Court of Appeals effected the correct result: the invalidation of an unconstitutional statute.

Furthermore, given the enormous and unequivocal protection this Court in *Buckley* afforded the right to engage in protected political expression by making independent expenditures, it is unnecessary for this Court to reiterate these clear principles in this case. Quite simply, neither Congress nor any state legislature would probably attempt to violate the principles from *Buckley* as the State of Minnesota has blatantly done in this case. Thus, this Court need not render what would amount to an advisory opinion on the continuing validity of *Buckley*.

CONCLUSION

For the above-stated reasons, this Court should deny the petition in this case.

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Respectfully submitted,

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